

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK (WEAN),

,

Petitioners,

v.

ISLAND COUNTY,

Respondent.

Case No. 98-2-0023c

**ORDER FINDING CONTINUING NON-
COMPLIANCE**

THIS matter came before the Board for a compliance hearing following Island County's submittal of a compliance report.¹ The hearing was held on April 6, 2015. Board members Raymond Paoella, Nina Carter, and William Roehl took part in the telephonic hearing, with Mr. Roehl presiding. Island County (the "County") was represented by Daniel B. Mitchell. Petitioner Whidbey Environmental Action Network (WEAN) was represented by David A. Bricklin. Steven Erickson, a member of WEAN, also took part.

I. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.² After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.³ For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the

¹ Respondent Island County's Compliance Report-Statement of Actions Taken, filed March 8, 2015.

² RCW 36.70A.300(3)(b).

³ RCW 36.70A.330(1) and (2).

1 challenger to establish that the new adoption is clearly erroneous in view of the entire record
2 before the board and in light of the goals and requirements of the GMA.⁴

3 In order to find the County's action clearly erroneous, the Board must be "left with the
4 firm and definite conviction that a mistake has been made."⁵

5 Within the framework of state goals and requirements, the Board must grant
6 deference to local governments in how they plan for growth:
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8 In recognition of the broad range of discretion that may be exercised by
9 counties and cities in how they plan for growth, consistent with the
10 requirements and goals of this chapter, the legislature intends for the boards
11 to grant deference to the counties and cities in how they plan for growth,
12 consistent with the requirements and goals of this chapter. Local
13 comprehensive plans and development regulations require counties and cities
14 to balance priorities and options for action in full consideration of local
15 circumstances. The legislature finds that while this chapter requires local
16 planning to take place within a framework of state goals and requirements, the
17 ultimate burden and responsibility for planning, harmonizing the planning
18 goals of this chapter, and implementing a county's or city's future rests with
19 that community. RCW 36.70A.3201 (in part).

20 In sum, during compliance proceedings the burden remains on WEAN to overcome
21 the presumption of validity and demonstrate that any action taken by the County is clearly
22 erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth
23 Management Act).⁶ Where not clearly erroneous and thus within the framework of state
24 goals and requirements, Island County's planning choices must be granted deference.

25 II. PROCEDURAL HISTORY, DISCUSSION AND ANALYSIS

26 This case has had a long history as is evident from the fact it began in 1998.⁷ That
27 history, and what was believed to be the remaining issue in this matter⁸, involve the
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29 ⁴ RCW 36.70A.320(1), (2), and (3).

30 ⁵ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d. 646 (1993).

31 ⁶ RCW 36.70A.320(2).

32 ⁷ For a detailed description of that history, see Order Finding Compliance, August 30, 2006, beginning at p. 3. Some of the delay has resulted from appeals heard in the superior courts as well as in the Court of Appeals. Further delays arose from a legislatively imposed moratorium on jurisdictions' actions to protect critical areas in areas used for agricultural activities.

⁸ See discussion at page 5 below.

1 protection of critical areas and began with the County's adoption in September of 1998 of a
2 comprehensive plan and implementing regulations, including a critical areas ordinance
3 (CAO). Included in the CAO was an exemption from the CAO for "[e]xisting and on-going
4 agricultural activities when undertaken pursuant to best management practices to minimize
5 impacts to critical areas".⁹ The Board held the County was in violation of the GMA duty to
6 protect critical areas by allowing the application of the exemption to agricultural activities,
7 including hobby farms, in the rural zone.¹⁰

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9 Appeals were filed challenging various findings and conclusions in the Board's FDO.
10 In 2004, Division I of the Washington State Court of Appeals held, inter alia, that the
11 County's agricultural exemption to its CAO was overbroad, affirming the Board's decision in
12 that regard.¹¹ That issue was subsequently considered once again by the Board following
13 the County's adoption of Ordinances C-150-05 and C-22-06 and the filing of a compliance
14 report.¹² In its August 30, 2006, Order Finding Compliance, the Board found the County
15 had achieved compliance and closed the case.¹³ That decision was appealed to the
16 Thurston County Superior Court which on April 2, 2013, issued an opinion in which it found
17 that the actions of the County in exempting existing agricultural uses that adopt
18 management plans was "clearly erroneous in view of the entire record before the board and
19 in light of the goals and requirements" of the GMA and remanded the matter.¹⁴

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21 The issue scheduled for consideration before the Board at the April 6, 2015,
22 compliance hearing once again involved the application of that exemption to rural zoned
23 lands.¹⁵ On compliance, the County adopted Ordinance C-16-15, an interim ordinance
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26 ⁹ ICC 17.02.107(E)(1).

27 ¹⁰ FDO, June 2, 1999, Finding of Fact 33.

28 ¹¹ Whidbey Env'tl. Action v. Island County, 122 Wn. App. 156 (Wash. Ct. App. 2004).

29 ¹² Island County's Compliance Motion Regarding Existing Rural Agriculture, May 16, 2006.

30 ¹³ Order Finding Compliance, August 30, 2006. Conclusion of Law C, p. 22: With the adoption of Ordinance
31 150-05 and C-22-06, the County has achieved compliance with RCW 36.70A.060, 36.70A.170 and
32 36.70A.172 through a program of best management practices, monitoring and adaptive management of
agricultural activities in noncommercial agricultural lands. This program protects the functions and values of
critical areas.

¹⁴ Letter Opinion, April 2, 2013, Thurston County Cause No. 06-2-02026-7, Hon. Chris Wickham.

¹⁵ Island County has four rural zones: R (rural), RA (rural agriculture), RF (rural forest) and RR (rural
residential). The Petitioner does not challenge application of the CAO exemption to the RA zone.

1 limiting the scope of the critical area regulation exemption.¹⁶ Ordinance C-16-15 only allows
2 the CAO exemption to apply to land zoned Commercial Agriculture and Rural, lands
3 participating in the chapter 84.34 RCW agricultural property tax program, and lands
4 encumbered in perpetuity by a recorded easement for the purpose of preservation of
5 agricultural practices.¹⁷ The County expressed an intent to incorporate a permanent
6 resolution of the issue into its required RCW 36.70A.130(5) review of its comprehensive
7 plan and development regulations.¹⁸

9 WEAN did not object to the substance of the County's compliance action, but took
10 exception to the fact Ordinance C-16-15 is an interim ordinance.¹⁹

11 The Board agrees that a jurisdiction cannot achieve compliance through the adoption
12 of an interim ordinance. The reason for this is that an interim ordinance will, by its terms,
13 expire in a set period of time. Once the interim ordinance expires, the County will again be
14 out of compliance. Given the statutory limitations on the Board's jurisdiction, expiration of
15 the interim ordinance would not confer jurisdiction upon the Board to determine compliance.
16 The Board is unable to address compliance until a permanent amendment has been
17 adopted.²⁰

19 Another issue which was raised by WEAN in its response to the County's
20 Compliance Report involves consideration of four plant species for designation as species
21 of local importance. WEAN takes issue with the County's statement that the only remaining
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24 ¹⁶ Ordinance C-16-15, p. 5: "Be it further ordained that these interim regulations shall remain in effect for a
25 period of one year as they are accompanied by a work plan attached herein as Exhibit C, or as soon as
26 permanent rules are adopted, whichever occurs earlier."

27 ¹⁷ *Id.*, p. 7.

28 ¹⁸ Respondent Island County's Compliance Report-Statement of Actions Taken, filed March 3, 2015, p. 3.

29 ¹⁹ "[If the County had adopted the action in the form of a permanent ordinance, we would have no issue.] But
30 the County's corrective action is merely interim in nature." WEAN's Response to County Notice of Action
31 Taken, filed March 17, 2015. P. 1.

32 ²⁰ *Friends of the San Juans, Lynn Bahrych and Joe Symons v. San Juan County*, Case No. 03-2-0003c. See
also *Evergreen Islands et al v. Skagit County*, Case No. No. 00-2-0046c: The County remains in
noncompliance on this issue, because it has adopted this as an interim ordinance.

1 issue in this case involves the CAO's agricultural exemption.²¹ It quotes the Board's
2 Compliance Order of November 26, 2001, wherein the Board stated:

3 We note that the County has stipulated that as to the chocolate lily, blue eyed
4 grass, clustered brodiaea and orange lily, its record and actions are not
5 complete and that it will reopen its public hearing process and consider
6 whether these four plants should be nominated and designated species of
7 local importance.²²

8 The County observes the Board closed this case in its August 30, 2006 Order
9 Finding Compliance where the Board stated:

10 THIS Matter comes before the Board upon the motion of Island County for a
11 finding of compliance in the last remaining compliance issue in a case filed in
12 1998. That issue is whether the best management practices program adopted
13 by Island County meets the Growth Management Act's (GMA) requirements
14 for protection of the functions and values of critical areas in noncommercial
15 agricultural zones.²³

16 The County having ACHIEVED COMPLIANCE on all issues in this case, this case is
17 hereby CLOSED.²⁴

18 The County argues WEAN did not challenge the Board order finding compliance on
19 all issues notwithstanding its filing of a Superior Court Petition for Review. In Superior
20 Court, WEAN only raised its concerns about the agricultural CAO exemption. It contends
21 WEAN is precluded from raising this issue nearly ten years after entry of an order finding
22 compliance on all issues, citing WAC 242-03-940(5).

23 Having considered the matter, and in light of its decision to enter an order of
24 continuing non-compliance and set a compliance schedule related to the failure of the
25 County to enact permanent compliance legislation, the Board concludes it need not
26 consider the parties' arguments on the issue at this time. If the parties fail to resolve the
27 species of local importance issue between themselves, the Board will further consider the
28 arguments in conjunction with future compliance proceedings.
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31 ²¹ Respondent Island County's Compliance Report-Statement of Actions Taken, p. 1: "A finding of compliance
32 would thus resolve the last remaining issue in GMHB Case No. 98-2-0023c . . ."

²² Compliance Order Re: A Portion of FDO 13-WEAN's Nomination of Species of Local Importance, p. 11.

²³ 2006 Order Finding Compliance on Critical Areas Protections in Rural Lands, August 30, 2006, p. 1

²⁴ *Id.*, p. 22

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III. ORDER

Based on the foregoing, Island County is found to be in continuing non-compliance as addressed above and must take legislative action to achieve compliance, according to the following schedule:

Compliance Due	November 13, 2015
Compliance Report and Index to the Record Due (County to file and serve on all parties)	November 20, 2015
Any Objections to a Finding of Compliance Due	November 30, 2015
County's Response Due	December 10, 2015
Telephonic Compliance Hearing Call 1 (800) 407-9804 and use pin 7757643#	December 17, 2015 10:30 a.m.

Dated this 1st day of May, 2015.

William Roehl, Board Member

Nina Carter, Board Member

Raymond Paoella, Board Member